

IN THE
Supreme Court of the United States

MISSOURI PACIFIC RAILROAD COM-
PANY AND WALKER D. HINES,
DIRECTOR GENERAL OF RAIL-
ROADS*Petitioners,*

v.

H. A. F. AULT.....*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS.

*To the Honorable the Supreme Court of United
States:*

The petition of Missouri Pacific Railroad
Company and Walker D. Hines, Director Gen-
eral of Railroads, respectfully shows:

A statute of the State of Arkansas provides
that whenever any railroad company or re-

ceiver operating a railroad shall discharge an employee his wages shall become due at once, and if not paid in seven days then as a penalty for the nonpayment the wages shall continue at the same rate until actually paid. (See section 6649 of Kirby's Digest of Statutes of Arkansas.)

The respondent, H. A. F. Ault, was in the employ of the Director General of Railroads operating the railroad of Missouri Pacific Railroad Company, and was separated from such employment July 23, 1918. Petitioners claimed that he quit and that he was paid all wages owing to him. Respondent claimed that he was discharged and that there was a balance due him of \$50. He sued the Missouri Pacific Railroad Company in a justice of the peace court of the State of Arkansas for the balance due on his wages and for the penalty at the rate of \$2.50 per day. The action was removed by appeal to the circuit court where the jury decided that he had been discharged and that the \$50 balance of wages was owing and returned a verdict for that and the penalty.

The suit was brought in August, 1918, and the Missouri Pacific Railroad Company was

made the sole defendant. In the circuit court the defendant filed a motion to substitute as defendant the Director General of Railroads and to dismiss the Missouri Pacific Railroad Company. This was done pursuant to the Railroad Administration's General Order No. 50, which was promulgated in October, 1918, and required all suits for actions arising during Federal control to be brought against the Director General as defendant, and in all actions already pending against the corporation for such causes of action that the Director General be substituted on motion as party defendant.

The circuit court overruled the motion to substitute and to dismiss the Missouri Pacific Railroad Company, but ordered that the Director General be made a joint defendant. The trial resulted in a verdict and judgment against both defendants for \$50 wages and \$390 penalty.

At the time of the motion to substitute defendants and at the trial in apt time the defendants objected to the action proceeding against the Missouri Pacific Railroad Company and to any judgment against Missouri Pacific Rail-

road Company, on the ground that there was no right to a judgment against the railroad company on a cause of action arising during Federal control.

Also due objection was made in apt time as the action proceeded to any judgment against the Director General for a penalty, on the ground that under the act of Congress and General Order No. 50, there could be no judgment against him for a penalty. The petitioners appealed to the Supreme Court of Arkansas from the judgment against them and there renewed their contention that no judgment could be properly entered against the Missouri Pacific Railroad Company for a cause of action arising during Federal control and that no judgment could be entered against the Director General for a penalty for the reasons aforesaid, and asked that the judgment against the railroad company be reversed and dismissed and that the judgment against the Director General be reversed for new trial or modified so as to eliminate the amount allowed as a penalty. The Supreme Court of Arkansas overruled both of these contentions and affirmed the judgment in an opin-

ion filed November 17, 1919. The petitioners in due time filed their motion for rehearing in the Supreme Court of Arkansas and renewed their contentions as aforesaid. The court considered their petition and overruled the same by its judgment rendered December 8, 1919.

The petitioner, Missouri Pacific Railroad Company, by moving to dismiss the action as to it in the trial court and objecting to judgment going against it on the grounds that the transaction on which the cause of action was based occurred during Government control, and the Director General had, by his General Order No. 50 provided that suits for such causes of action should be against the Director General and not against the corporations, and that the enforcement of such judgment would be a taking of its property without due process of law contrary to the Fourteenth Amendment to the Federal Constitution, claimed a right, privilege or immunity under the Constitution and a statute of the United States.

The Director General of Railroads by objecting to the judgment for any penalty against him on the ground that the act of Congress and

General Order No. 50 of the Director General provided that he should not be liable for any penalty, claimed a right, privilege or immunity under the Constitution and statute of, and a commission held and authority exercised under the Constitution of the United States.

The effect of the trial court's action in overruling petitioner's motion to substitute the Director General as defendant and to dismiss as to the railroad company and in rendering judgment against both defendants for the penalty, and of the Supreme Court's action in affirming such judgment, was to decide against a right, privilege and immunity so claimed by the Missouri Pacific Railroad Company and against a right, privilege or immunity and a commission held and an authority exercised under the Constitution of the United States by the Director General of Railroads, as aforesaid.

The decision of the Supreme Court of Arkansas was erroneous in the following particulars:

1. In deciding that judgment could be lawfully rendered against the Missouri Pacific

Railroad Company for a cause of action arising on a transaction of the respondent, H. A. F. Ault, with the agents of the Director General of Railroads growing out of the possession, use, control and operation of the railroad of Missouri Pacific Railroad Company by the Director General of Railroads of the United States.

2. In deciding that the enforcement of such judgment against Missouri Pacific Railroad Company would not amount to a taking of private property without due process of law, contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. In holding that section 6649 of Kirby's Digest of the statutes of Arkansas, authorizes judgment for the penalty against the Director General of Railroads of the United States.

4. In holding that the provisions of General Order No. 50 of the Director General of Railroads of the United States did not exempt and exclude the Director General from any suit or judgment for penalty provided by section 6649 of Kirby's Digest of the statutes of Arkansas.

5. In holding that under the act of Congress of August 29, 1916, the President's proclamation of December 26, 1917, and the act of Congress of March 21, 1918, providing for the possession and operation of the railroads by the United States Government, and the lawful orders made pursuant to said statutes and proclamations, the Director General was not immune and exempt from actions, suits and judgments for the penalty for the nonpayment of wages, provided by section 6649 of Kirby's Digest of the statutes of Arkansas.

6. Petitioners furnish as Exhibit "A" to this petition a certified copy of the entire transcript of the record in the case, including the proceedings of the Supreme Court of Arkansas to which the writ of *certiorari* is asked to be directed.

Wherefore, petitioners respectfully pray that writ of *certiorari* may issue out of and under the seal of this court directed to the Supreme Court of Arkansas, to command said court to certify and send to this court on a day certain to be therein named and designated, a full and complete transcript of the record and

proceedings of the said Supreme Court in said cause therein entitled Missouri Pacific Railroad Company, and Walker D. Hines, Director General of Railroads, Appellants, v. H. A. F. Ault, Appellee, to the end that such case may be reviewed and determined by this court as provided by the act of Congress of September 6, 1916, and said judgment of the Supreme Court of Arkansas in said case may be reversed by this Honorable Court.

Respectfully submitted,

ROBERT E. WILEY,

Attorney for Petitioners.

BRIEF.

Two questions are presented on this record:

First, is a corporation which owns a railroad system liable on a claim arising on a transaction with the servants of the Director General of Railroads growing out of the possession, control and operation of such railroad by the Director General on behalf of the United States Government?

Second, is the Director General of Railroads liable for a penalty prescribed by a State statute against railroad corporations for failure to pay wages of a discharged employee when due?

These questions involve the legal operation and effect of statutes and the Constitution of the United States and therefore present Federal questions which parties with rights involved are entitled to have examined and decided by the Supreme Court of the United States when brought to that court in a proper way.

The cause has been lodged in this court upon a writ of error allowed by the Chief Jus-

tice of the Supreme Court of Arkansas. Some question appears as to whether writ of error or writ of *certiorari* is the proper method and therefore petition for *certiorari* is now also filed in order to insure that the case may be heard and decided by this court.

Section 237 of the Judicial Code as amended by Act of September 6, 1916, provides that this court may by *certiorari* cause to be certified to it for review from the highest court of a State, any cause "where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against" the same.

Here the respondent, Mr. Ault, sued the railroad corporation for wages earned as a servant of the Director General operating the railroad of such railroad corporation: the transaction arose in July, 1918. In October, 1918, the Director General of Railroads issued his order No. 50 providing that all suits to be brought on matters growing out of Federal control should be prosecuted against the Di-

rector General of Railroads; and that the pleadings in suits already pending against the railroad corporation on such matters, "may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom." Thereafter, and before the case was called for trial, in the circuit court the carrier corporation moved the court under that order to substitute the Director General of Railroads as defendant and dismiss the action as to the carrier company, which motion the court denied, but ordered the Director General to be made a joint defendant. To which action the defendants saved their exceptions.

At the trial the defendants requested the court to instruct the jury to find for the defendants. And also that plaintiff was not entitled to recover any penalty. The court refused these instructions and defendants saved their exceptions.

The court submitted the case to the jury to find the facts for or against the plaintiff generally without distinguishing whatever be-

tween the defendants; and on verdict being returned for the plaintiff, the court entered judgment against both defendants for \$50 wages and \$390 penalty.

Defendants filed their motion for new trial in the trial court on the ground, among others, that the court erred in refusing to substitute the Director General as defendant in place of the railroad company and in refusing to dismiss the action as to the railroad company, and in refusing to give a peremptory instruction to find for the defendants, and in refusing to instruct that no penalty could be recovered. The court overruled this motion and defendants saved their exceptions and appealed to the Supreme Court of Arkansas where the same contentions were made by the defendants, in addition to others which have now passed out of the case. We quote from the brief of these petitioners on original hearing in the Supreme Court of Arkansas, as follows:

"This cause of action should have been dismissed entirely as to the railroad company, for appellee alleges that he worked during July, 1918, which was after the railroads had been

taken over by the government and after an order had been made by the Director General of Railroads that suits must be instituted against him, and not against the railroad companies.

Rutherford v. Union Pac. R. Co., 254
Fed. 880.

Appellants asked the court to instruct the jury that appellee was not entitled to recover a penalty. The jury should have been so instructed, and we ask that this cause be reversed and dismissed entirely as to the railroad company and that the judgment for penalty against the Director General of Railroads be reversed and dismissed."

The act of Congress of August 29, 1916, making appropriations for the army provided that the President in time of war is empowered through the Secretary of War to take possession and assume control of any system or systems of transportation and utilize the same to the exclusion of all other traffic thereon for the transportation of troops, etc.

The President by proclamation made on December 26, 1917, took possession and as-

sumed control of "each and every system of transportation and appurtenances thereof located wholly or in part within the boundaries of Continental United States" at 12 o'clock noon of the 28th day of December, 1918, and in the proclamation he directed that "the possession, control and utilization of such transportation systems hereby by me undertaken shall be exercised by Wm. G. McAdoo, who is hereby appointed Director General of Railroads," and also "Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such."

Said proclamation further provided "but suits may be brought by and against said carriers and judgments rendered as hitherto until

and except so far as said director may, by general or special orders, otherwise determine."

U. S. R. R. Administration Director
General of Railroads Bulletin No.
4 (revised), p. 6.

The act of Congress approved March 21, 1918, for the operation of transportation systems while under Federal control provided in more detail methods, and rights and liabilities of the parties concerned during Federal control of the roads.

Section 8 of the act provides: "That the President may execute any of the powers herein and heretofore granted him with relation to Federal control through such agencies as he may determine."

Section 10 of that act provides:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the

President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress, or official order or proclamation relating thereto shall upon motion of either party be transferred to the court in which it was originally instituted. But no process, *mesne* or final, shall be levied against any property under such Federal control."

40 Stat. 456 C. 25, Comp. St. 1918, section 3115, 3-4.

After the passage of that act the President issued another proclamation on March 29, 1918, in which he provided that pursuant to the au-

thority vested by said act, "I do hereby authorize Wm. G. McAdoo, Director General of Railroads * * * to issue any and all orders which in any way may be found necessary or expedient in connection with the Federal control of systems of transportation, railroads and inland waterways as fully in all respects as the President is authorized to do."

United States Railroad Administration,
Director General of Railroads
Bulletin No. 4 (Revised), p.
20.

On October 28, 1918, the Director General issued his order No. 50 as follows:

"Whereas, the act of Congress, called the Federal Control Act, approved March 21, 1918, provided that 'carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control, or with any order of the President;' and

"Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising under Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporation;

"It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo,

Director General of Railroads, and not otherwise. Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures.

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"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

U. S. R. R. Administration, Director
General of Railroads, Bulletin
No. 4 (Revised), p. 334.

By appropriate orders and by appointment of regional directors and other subordinates, the Director General made all of the employees on railroads theretofore working for the carrier companies, employees and servants of the Director General of Railroads, and through them took and held exclusive posses-

sion and control of the physical properties and business of all of the carrier companies to the exclusion of the owners and proceeded to operate and carry on all of the business of transportation theretofore conducted by the carrier corporations including the employing, paying and discharging of servants, agents and employees.

The statute of Arkansas on which the suit for penalty is based is as follows:

"Section 6649. Whenever any railroad company or corporation or any receiver operating or constructing any railroad engaged in the business of operating or constructing any railroad or railroad bridge shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; and such servant or employee may request of his foreman or the keeper of his time to have the money due him, or a valid check

therefor, sent to any station where a regular agent is kept; and if the money aforesaid, or a valid check therefor, does not reach such station within seven days from the date it is so requested, then as a penalty for such nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid. Provided, such wages shall not continue more than sixty days, unless an action therefore shall be commenced within that time. (Act of April 21, 1903.)

In July, 1918, Mr. Ault was employed as a station baggageman at Malvern, Arkansas, by the regular agent of the Director General at that station having authority to hire and discharge employees.

This was at the station of the Missouri Pacific Railroad Company in Arkansas, and it was then under Federal control. After working 21 days he was separated from the service on account of a dispute over working on Sunday, he claiming that he was discharged, the agent claiming that he quit because he would not work on Sunday whereas the duties of his job included Sunday service.

It is the contention of your petitioners that as to the Missouri Pacific Railroad Company, the several acts of Congress, proclamations and orders issued pursuant thereto as aforesaid relieved the said railroad company from suit and judgment for the transaction with Mr. Ault. Special reliance being upon General Order No. 50 which provided that pending suits and pleadings should be amended so as to substitute the Director General of Railroads as sole defendant and dismiss the action as to the carrier corporation.

Further as to the said railroad company we contend that if it was the intention and meaning of the aforesaid statutes to provide that judgments should go against the carrier corporation for such transactions, those statutes were unconstitutional because the enforcement of the judgment would take the company's property without due process of law, contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

As to the Director General, your petitioners claim that he is immune or exempt from a

suit or judgment for the penalty by the terms of the aforesaid acts of Congress, proclamations and orders; particularly the provisions of General Order No. 50 to the effect that all suits based on claims growing out of the Federal control shall be brought against the Director General, "provided however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures."

JUDGMENT AGAINST THE MISSOURI PACIFIC RAILROAD COMPANY FOR ANY SUM IS ERROR.

The principle of law upon which a railroad corporation is liable to judgment for the acts of the servants performing the several services which enter into transportation is that of RESPONDEAT SUPERIOR. The employer or master is responsible in law for the act, or omission, of his servant; in no other way can the employer corporation be subject to a liability. With the separation of all of the persons engaged in railroad work from the employment of the railroad corporation, the re-

sponsibility of the corporation for the acts of such persons ceased.

Mardis v. Mo. Pac. R. Co., 258 Fed. 945.

Under the doctrine of *RESPONDEAT SUPERIOR* the test of liability of the master is the power of control over the servant. On this point the Circuit Court of Appeals for the Eighth Circuit comments as follows, in the case of *Brady v. Chicago & G. W. R. Co.*, 114 Fed. 100:

"If the master can not command the alleged servant, then the acts of the latter are not his, and he is not responsible for them. If the principal can not control and direct the alleged servant, then he is not his agent, and the principal is not liable for his acts or his omissions. In such case the maxim *respondeat superior* has no application, because there is no superior to respond. In an action against an alleged master or principal for the act of his alleged servant or agent under the maxim *respondeat superior*, there can be no recovery in the absence of the right and power in the former to command or direct the latter in the performance of the act charged, because in such a case there is no superior to answer."

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The opinion in the case of *Mardis v. Missouri Pacific Railroad Co.*, *supra*, after showing that during Federal control the Director General was operating the road in exclusion of the carrier corporation, that the relation of master and servant had ceased to exist between the employees operating the railroad company and the railroad company, quotes the above language from the *Brady* case, and then proceeds as follows:

"The railroad, therefore, can not be held for the negligence of the employees of the Director General, unless liability is imposed by section 10 of the act of Congress of March 21, 1918 (40 Stat. 456, c. 25 [Comp. St. 1918, section 3115 3-4j]). That section provides:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President."

"Is the liability sought to be fastened on the railroad company under the facts alleged in the complaint in this case inconsistent with the provisions of the acts of Congress referred to, or with the order of the President?

"In the proclamation of the President assuming control of the railroads it was provided that—

" 'Suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director General may, by general or special orders, otherwise determine.' Pages 89-91, Proclamations 1917, pt. 2, Statutes U. S. 1917-1918 (Comp. St. 1918, section 1974 a, note.)

"That proclamation, as indicated by the foregoing quotation, authorized the Director General to modify or change the permission given in the proclamation to bring suits against carriers. The act of March 21, 1918, did not modify any of the provisions of the proclamation of the President. On October 28, 1918, by General Order No. 50, the Director General ordered 'that actions at law, suits in equity and proceedings in admiralty hereafter brought in

any court based on contract binding on the Director General of Railroads, claim for death or injury to persons, or for loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad system or transportation by the Director General of Railroads, which action, suit or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise.' * * *

"The order of the Director General does not contravene the acts of Congress. It is authorized by the proclamation of the President and directs a procedure that is in strict accordance with the actual facts and the rules of legal liability."

Rutherford v. Union Pacific Railroad, 254 Fed. 880, is directly on our point. There the defendant railroad corporation presented a motion to substitute the Director General in the place of the railroad corporation as defendant in the suit; the court, District Judge Munger of the District of Nebraska, granted the motion,

In the opinion the court shows that the defendant relied upon the part of General Order No. 50 of October 28, 1918, which your petitioners now rely on to the effect that pleadings in all actions based on causes growing out of the operation of the railroads by the Government may, on application be amended by substituting the Director General as defendant and dismissing the company. The plaintiff there relied upon the provisions of section 10 of the act of Congress, approved March 21, 1918, that "actions at law may be brought by and against such corporations and judgments rendered as now provided by law." Judge Munger in his opinion decided that the words "such carriers" meant "the carriers while under Federal control" as mentioned in the first part of the section; and that the carrier which was subject to suits was the agent of the President who is operating the railroads, and not the railway carriers. The opinion says:

"It would have been an anomaly to have given the actual control of the railroads to the Director General, and to have provided that suits arising out of his acts should be brought against the corporations who had been divested

of authority over those acts. Moreover, the language which immediately follows that portion of the statute relied on by plaintiff demonstrates that the 'carrier' who is subject to suit is the agent of the President who is operating the railroads. The language is: 'And in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.'

"The corporations or persons who had lost control and possession of the railroads would have no occasion to assert the defense that they were instrumentalities or agents of the government as to acts which occurred after their control had terminated" (p. 881).

This meaning is further borne out by the definition given in the first section of the act itself where it is said:

"Be it enacted, etc., that the President having in time of war taken over possession, use, control and operation (herein called Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized, etc."

It is here shown that the word "carriers" is intended to mean "certain railroads and systems of transportation."

In *Hatcher v. A. T. & S. F. R. Co.*, 258 Fed. 952, it was held that where the Federal government had taken over the operation of the railroad in exclusion of the company from active management the company could not be made liable for negligence or for injury to freight shipments.

But even if it should be considered that the words "carriers while under Federal control" meant the carrier corporations themselves, still the provisions of section 10 subject them to such laws and liabilities only as are not inconsistent with the provisions of the acts of Congress and orders of the President. And as shown in the well considered opinion of District Judge Westenhaver in the case of *Haubert v. B. & O. R. Co.*, 259 Fed. 361, a liability for acts of the servants of the Director General would be clearly inconsistent with the provision of the acts of Congress and the proclamations and orders of the President and Director General. In that case the court sustained a de-

murrer of the defendant railroad company to a complaint on a cause of action based on the wrongful death by operation of the railroad which occurred during Federal control. The opinion after showing that it is conclusively settled that complete possession and control of all railways and not a divided possession and control have been transferred to the United States by the statutes, and proclamations, and that all moneys derived from the operation of the railways are the property of the United States which together with a revolving fund appropriated by Congress are to be used to pay the expenses and liabilities of the railway lines while under Federal control, goes on to say:

“Manifestly it seems to me that in view of these conditions no liability exists against the railroad company itself for a personal injury due to operation under Federal control, and that no judgment can be rendered therefor which will become a lien upon the corpus of its property or payment compelled therefrom. If this were done, the result would be that one person’s property would be taken without his consent and without compensation to pay the debt of another.

"If the words 'common carriers' (in section 10) mean the railway companies themselves, as distinguished from the agency provided by the act for operating the railway lines, it is none the less true that they are made subject only to such liabilities as are not in inconsistent with the provisions of the act itself. It may be consistent to subject the railway companies to liabilities created by themselves or existing before being ousted from the possession and control of the property; it would be inconsistent with all the provisions of the act to subject them to liabilities for the acts and conduct of public agents operating their property under Federal control. It follows that the provisions of this section do not impose a liability upon the railway companies for acts of the Director General of Railroads and his agents, because so to do would be inconsistent with the provisions of this act.

"My conclusion is that liabilities due to operation by the agencies having possession by virtue of the acts creating and authorizing Federal control are not liabilities of the railroad companies that have been ousted from such

possession and control, that suits can not be brought against such companies and prosecuted to judgment against them, and that such claimants are limited to a right of action against the Federal control agency and to such sources of payment as are provided by the Federal Control Act."

In *Nash v. Southern Pacific Railroad Co.*, 260 Fed. 280, the same question we have arose; plaintiff sued the railroad corporation for injury to person and property on a transaction occurring on July 8, 1918, during Federal control of the corporation's railroad system. A motion was interposed by the defendant, joined in by the Director General, that the latter be substituted as defendant and the action dismissed as to the railroad corporation. The court held that General Order No. 50 required the substitution of the Director General as defendant and that such order was within the authority conferred upon the President, and was not inconsistent with section 10 of the Act of March 21, 1918. The court's opinion, after stating the facts and quoting General Order No. 50, in full, shows that the plaintiff challenged

the validity of General Order No. 50 because it was purely legislative and because it was in conflict with section 10 of the Act of March 21, 1918, which plaintiff claimed expressly authorized the maintenance of the action against the railroad corporation.

Commenting upon this contention the court says in its opinion:

"It will readily appear, I think, that this contention of the plaintiff proceeds from a failure to apprehend fully the character and scope of the Federal Control Act, and more particularly the purpose to be subserved by section 10. In the first place, the act, as expressly declared, is an emergency measure, to meet extraordinary conditions growing out of an actual state of war, and calling for an exertion of the most extreme and drastic powers of government to meet those conditions. It is accordingly to be construed, not with that meticulous nicety which might be dictated by other circumstances, but in a broad spirit of liberality, in keeping with the purpose intended to be accomplished and having in view its emergency character.

"As the terms of the act at once disclose, it was the purpose and intent of Congress that the possession and control of the systems of transportation taken over in whole or in part by the President was to be an exclusive one, to no extent shared in by the owners. If the latter or their officers were retained as operators, they were to act merely as servants and under pay of the Government; and while the owners were to be compensated for the use of their properties, everything earned or accruing from their operation in excess of such compensation was to be the property of the Government. Such a taking involved in no sense the element of agency by the Government for the owners. Agency implies a consensual or contractual relation, but this was not such. It was more nearly analogous or akin to a taking by the sovereign in the right of eminent domain; and the result of such a taking was necessarily to relieve the owners of systems so taken from any legal responsibility to the public arising out of their operation, and quite as necessarily an assumption of such responsibility by the Government. And this, as is clearly shown by the whole framework of the act, was what Con-

gress desired to accomplish. The conditions to be met in the emergency presented were deemed such that the administration of this vital instrumentality for successfully carrying on the war was to be freed for the time from any hazard arising through a divided control or responsibility. And as Congress could not in the nature of things foresee the many exigencies and necessities that might arise for prompt, free, and unrestrained action by the executive, in the practical administration of this great trust, the President was clothed with the broadest and most plenary powers and authority to deal with the problems as they might arise and in such manner as his judgment should dictate; and this not only as between the Government and the owners, but as between the Government and the general public, with express power to make all orders and regulations essential to carrying out the purpose of Congress.

"This being the effect of the act, and I can see room for no other construction, the provisions of General Order No. 50 were quite in harmony with a correct interpretation of such

purpose. While perhaps in a limited and technical sense the particular exertion of power embodied in the order may be said to involve the legislative function, it was not such in a sense that would render its delegation to the executive an excess of the power of Congress. It is not every such delegation of power that will be held to transgress the provisions of the Constitution defining the limitations between the legislative and executive departments of the Government; and this act, I think, for the reasons suggested, should be held to present one of the exceptions. In many instances Congress, after clearly defining the purpose to be accomplished by its enactment, has given executive officers power to make such needful and proper rules and regulations for carrying out the purpose as their judgment and the necessities should dictate, and such regulations have been uniformly held to have the force and effect of legislation. Congress has gone so far as to provide that a violation of rules and regulations so made shall constitute a criminal offense. These principles are to be found in *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; *Buttfield v. Stranahan*,

192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Field v. Clark*, 143 U. S. 649, 694, 12 Sup. Ct. 495, 36 L. Ed. 294; *Arver v. United States*, 245 U. S. 366, 389, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856; and many other cases to like effect. In *Field v. Clark*, it is said:

“The Legislature can not delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.’

“And in *Arver v. United States* (Selective Draft cases), where very extended powers were conferred upon the executive, the court, answering a similar objection say:

“We think that the contention that the statute is void, because vesting administrative

officers with legislative discretion, has been so completely adversely settled as to require reference only to some of the decided cases. *Field v. Clark*, 143 U. S. 649 (12 Sup. Ct. 495, 36 L. Ed. 294); *Buttfield v. Stranahan*, 192 U. S. 470 (24 Sup. Ct. 349, 48 L. Ed. 525); *Intermountain Rate Cases*, 234 U. S. 476 (34 Sup. Ct. 986, 58 L. Ed. 1408); *First National Bank v. Union Trust Co.*, 244 U. S. 416 (37 Sup. Ct. 734, 61 L. Ed. 1233, L. R. A. 1918C, 283, Ann. Cas. 1918D, 1169).'

"The instant legislation, I think, falls clearly within the principles of these cases, and I am therefore of opinion that this order was well within the power of the Director General as the representative of the President. And certainly it was both a wise and expedient thing, and in the interest of the proper and orderly administration of justice, to direct that the defense in actions and proceedings for causes arising under Government administration and for which the latter, as we shall see, was alone answerable, should be in the name and under the direction and control of the Government's representative. Indeed, it is doubtful if any judgment binding upon the

Government could be obtained, in an action so arising, to which its representative was not made a party.

“Nor does the order in question contravene in any respect the provisions of section 10. It may readily be shown, I think, that the latter was not intended to apply to class of cases provided for in that order. This is sufficiently manifest, perhaps, from the limitations of the section itself. The owners are to remain subject to all laws and liabilities as carriers *‘except in so far as may be inconsistent with the provisions of this act * * * or with any order of the President.’* (Italics volunteered.) It would seem obviously and at once ‘inconsistent’ with the provisions of the act that liability should remain to the carriers for causes of action arising out of transactions with which they had nothing whatsoever to do and over which they had no control; and this language very clearly implies that Congress foresaw that such causes of action would necessarily arise under Government operation for which the owners should not and indeed could not be made to respond; and as it could not anticipate

and provide for the instances which might arise, it wisely left it to the President to regulate the manner in which such actions should be maintained.

"But over and above this consideration, the situation presented is this: What was authorized by this legislation to be taken under Federal control was specific property—that is, solely the transportation systems of the country—and that was all the proclamations of the President assumed to take into his control. The corporations owning these properties were not taken; they were left untouched and free to continue their functions as such in all respects other than in the operation of their carrier systems. Moreover, the legislation does not require the taking of every system nor all of any one system, but only to the extent deemed necessary for war purposes. This being the case, Congress was bound to know that in the business transactions of these corporations, in activities as to which they were left in control, many obligations would be created and causes of actions arise in their dealings with the public, wholly unconnected with the operation and

control of their transportation systems by the Government and with which the latter would therefore have no concern as a party; it was bound to know, moreover, and doubtless had in mind, that many thousands of actions against these corporations would be pending in the courts throughout the country and many causes of action accrued, but not yet in suit, at the time Federal control would be assumed, all arising prior to such taking and with which the Government was not concerned.

“With this situation in mind, Congress enacted the provision to be found in section 10, and it was not only a wise, but a necessary, provision for the protection of the rights of those dealing with these corporations, and to avoid what otherwise would have resulted in great confusion and uncertainty. But that it was intended as the purpose of section 10, as urged by plaintiff, to authorize suits against the owners of these properties in causes of action arising out of transactions had with the Federal Railroad Administration, or through torts committed by its agents while under its control—things for which, we repeat, the owners could

be in no way responsible—may not for a moment be indulged; such a construction would clearly render the provision obnoxious to the objection of authorizing the taking of property without due process of law, a purpose which may not be imputed to Congress.”

It has been held by this court that the control and management of the railroads by the United States is complete and exclusive of the carrier corporation owners. This was held in the case of *Northern Pacific Railroad Co. v. North Dakota*, 249 Fed. 533, where the court says:

“No elaboration could make clearer than do the Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918, dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroad in question. But if it be conceded that, despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt,

the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came, and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing? This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them, which was plainly essential to the authority given was not included in it."

Other cases which hold that the carrier corporation can not be held liable for transactions with the Director General during Federal control are—

Sagona v. Pullman Co., 174 N. Y. Supp. 536.

Oyler et al. v. C. C. C. & St. L. R. Co.
(Superior Court of Cincinnati),
17 Ohio Law Reports, 356.

If it should be considered that the provisions of section 10 of the Act of March 21, 1918, mean that the carrier corporations shall be liable to a judgment for transactions with the Director General then we contend that the enforcement of such judgment would be a taking of the carrier's property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Arkansas in its opinion in this action answered this contention by saying that the act of Congress provided for the payment by the Government to the carriers of all expenses and liabilities of operations; that this would include any judgment which might be rendered against the corporation in this action. But this is not an adequate remedy. It can not be said that the substitution of a claim against the Government for the citizen's right under the Fourteenth Amendment to be immune from the taking of his property without due process of law, would satisfy the constitutional guarantee.

A claim against the Government may or may not be collected. It involves much nego-

liation and sometimes litigation and very great delay accompanied with loss of interest and other damages. The Constitution guarantees to the citizen that his property shall not be taken without due process of law, and to say that the Government can authorize the rendering and enforcement of a judgment against one citizen for the liability of another citizen on the promise that the Government will reimburse the judgment debtor and hold him harmless against damages on account of the enforcement of the judgment is not a compliance with the constitutional guarantee.

THE DIRECTOR GENERAL IS NOT LIABLE FOR ANY PENALTY.

It is within the power of the Government to take the railroads for war purposes and operate them pursuant to United States laws. Under such operation the statutes of the United States and the regulations and orders of the constituted authorities made pursuant thereto constitutes the law of the land under the provisions of the United States Constitution and supersedes all State laws covering the same field.

It is therefore lawful for Congress, or for the authority provided by Congress to operate the railroads, to make orders which supersede State regulatory provisions in the field of the operation of the railroads. Under this authority it is lawful for the Congress or the Director General to provide that penalties shall not be imposed for infringement of State regulations of the conduct of the carrier's business.

The Director General pursuant to the laws of Congress and proclamations of the President authorizing him to make general orders has made General Order No. 50 which provides for the prosecution of suits against the Director General for claims arising on transactions with the Director General during Federal control but subject to the condition and proviso that the order "shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures." This is a clear indication of the intention that the Government should not be subjected to suits for fines. No action can be maintained against the United States except by its consent and we think it is clear from this order that it has not consented to suits for fines.

It may be argued that the only remedy is not adequate or that there is no remedy at all if neither the carrier nor the Government is liable for the penalty; but as was said by Judge Westenhaver in *Haubert v. B. & O. R. Co.*, *supra*, "if inadequate, and further remedies, both in suing and in obtaining payment, are needed to give full relief, they must be sought from that authority which confers the right to sue the United States." Such authority is Congress.

This contention on the part of the Director General of Railroads constitutes a claim of a right or immunity under a statute of the United States, and under a commission of or authority exercised under the United States.

Likewise the claim of the Missouri Pacific Railroad Company that it is exempted from a judgment for acts with reference to its property by the servants of the Director General of Railroads constitutes a claim of a right, privilege or immunity under a statute of the United States; and its claim that the enforcement of such a judgment would take its property without due process of law contrary to the Four-

teenth Amendment to the Constitution is a claim of immunity under the Constitution of the United States.

Therefore we respectfully submit that the petitioners are entitled to have a writ of *certiorari* from this court to the Supreme Court of Arkansas to bring the record here; and that upon being brought here the judgment of the lower court should be reversed and dismissed as to the Missouri Pacific Railroad Company, and the judgment for the penalty against Walker D. Hines, Director General of Railroads, should be reversed and dismissed.

Respectfully submitted,

EDGAR B. KINSWORTHY,

ROBERT E. WILEY,

Attorneys for Petitioners.

Little Rock, Arkansas, February 25, 1920.

IN THE
Supreme Court of the United States

MISSOURI PACIFIC RAILROAD
COMPANY AND WALKER D. HINES,
DIRECTOR GENERAL OF
RAILROADS

Petitioners

V. No. 252
1919

H. A. F. SUTHERLAND

Respondent

RESPONSE TO PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

FRANK PACE, *Attorney for Respondent*
GLOVES & SMITH, *of Counsel*

IN THE
Supreme Court of the United States

MISSOURI PACIFIC RAILROAD
COMPANY AND WALKER D. HINES,
DIRECTOR GENERAL OF
RAILROADS ----- *Petitioners*

V. No. 733. Oct. Term 1919.

H. A. F. AULT ----- *Respondent*

RESPONSE TO PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

To the Honorable SUPREME COURT OF
UNITED STATES:

THE RESPONSE to the petition of the Mis-

souri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, respectfully shows:

A statute of the State of Arkansas provides that whenever any railroad company or receiver operating a railroad shall discharge or refuse to further employ one of its employees, that his wages shall become due and payable at once and if not paid in seven days after notice or demand, then as a penalty for the non-payment of the wages, the wages shall continue at the same rate until paid, at the contract price.

The respondent was in the employ of the Missouri Pacific Railroad Company and not in the employ of the Director General of Railroads. He was employed by W. W. Jones, Agent of the Missouri Pacific Railroad Company at twenty-five cents an hour or \$2.50 per day. He was discharged and refused further employment at the contract price. He made his demand as required by the statute and after seven days repeatedly demanded his money. It was not paid him. He worked twenty-one days and it was due him \$50.00. They have never to this day paid him one cent for this labor. It discharged him July 23rd, 1918. Suit was brought in August, 1918, in the Justice Court having jurisdiction. It

did not answer. It appealed to the Circuit Court and there filed answer and denied that they owed him for labor. A verdict of a jury was for the respondent. It appealed to the Supreme Court of Arkansas. It was there affirmed by the highest court of the State. In the Circuit Court, it filed its motion to make Walker D. Hines, Director General, a party defendant, which was by the court granted. It also asked that suit be dismissed as to it. Suit was brought in this case before General order No. 50 was issued and was pending in the court when it was issued. General order No. 50 was issued on the 28th day of October 1918. This is the first order directing that suits be brought against the Director General and not against the corporations, which is in Bulletin No. 4 (Revised) page 20.

The same order also provides that suits pending, for a cause of action arising since December 31st 1917, MAY, on application be amended by substituting the Director General. Not mandatory but permission given to do that, if the parties litigant and courts desired to do so.

The doctrine of RESPONDEAT SUPERIOR applied in this case at bar.

U. S. R. R. Administration, Director General of Railroads, Bulletin No. 4 (Revised) was not is-

sued until long after this cause of action arose. It was in this order, and after the appointment of regional directors and other subordinates, that the Director General made all the employees on railroads heretofore working for carrier companies, employees and servants of the Director General of Railroads. The respondent was a servant and employee of the Missouri Pacific Railroad on the 23rd day of July 1918.

The Director General was empowered to act by appointment from the President and to use railroads for the transportation of troops and supplies to the exclusion of other traffic and was in no sense acting as a receiver.

See Act of Congress of August 29th, 1916.

The petitioners in their brief pages 14 and 15, use this language: "The President by proclamation made on Dec. 26th, 1917, took possession and assumed control of each and every system of transportation and appurtenances thereof located wholly or in part within the boundaries of continental United States at 12 o'clock noon of the 28th day of December 1918" and appointed Wm. G. McAdoo Director General. If they are correct in that there was no Director General at the time of this cause of action. But if there was the same proclamation

of the President December 26th 1917 FUDTHER PROVIDED,, But suits may be brought by and against said carriers, and judgments rendered as heretofore until and except so far as said Director may, by general or special orders otherwise determine. Then it was proper to bring this suit as it was brought.

The Act of Congress approved March 21st 1918, provided in detail methods, the rights and liabilities of the parties concerned during Federal control of roads.

Sec. 10 of this Act provides: That carriers while under Federal control shall be subject to all laws and liabilities as common carriers whether arising under State or Federal laws or at common law except in so far as may be inconsistent with the provisions of this Act, etc. It then provides that actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law. It further provides that no defense shall be made on the ground that it is an instrumentality, or agency of the Federal Government. This act further provides that suits thus brought are not transferable.

The evident purpose of this section 10 is en-
coughed in the last expression in the section: "BUT

no process, mesne or final shall be levied against any property under such Federal control." After the passage of this act we have Bulletin No. 4 (Revised) as referred to in petitioners' brief directing that after this (which was October 28th 1918, after this cause of action at bar arose in July before) should be brought against William G. McAdoo and that other suits brought prior to this, MAY, (not SHALL), on application be amended by substituting the Director General as a party, etc.

The only question presented is "Does May mean Shall. Was it mandatory or was it directory? The Supreme Court of Arkansas did not err in its decision.

Wherefore, respondent prays, that writ of *certiorari* be not issued out of or under the seal of this court directed to the Supreme Court of Arkansas to command said court to certify and send to this court on a day to be named, a transcript and record in said cause.

Respectfully submitted,

FRANK PACE, *Attorney for Respondent*
GLOVER & SMITH, *of Counsel* --

BRIEF

The petitioners seem to be at a loss to know how their contention is to be presented to this court. First they had it lodged by writ of error. Now they want a writ of *certiorari*. No Federal question was raised in the pleadings and we do not think it can be reviewed by either of the courses taken.

The respondent was in the employ of the Missouri Pacific Railroad Company, was employed by their agent, W. W. Jones, at Malvern, Arkansas, at the price of \$2.50 per day. In a few days after he was employed by Jones, their agent, Mr. Jones was called into the war service and Mr. Williams took his place as agent for the Missouri Pacific Railroad Company. The respondent had worked twenty-one days, his time amounting at the time to even \$50.00. Mr. Williams on the 23rd day of July 1918, discharged him and refused to further employ him at the contract price of \$2.50 per day, claiming that the work or job only paid \$1.50 per day, or \$45.00 per month. They refused to pay him after his demand and a full compliance with the Statute of Ark-

ansas applying in such cases. In August 1918, the respondent brought suit in the Justice Court having jurisdiction of the matter. No answer was filed in that court and judgment was rendered for the respondent for his labor and the penalty provided for refusing or failing to pay within the time required by the Statute of Arkansas.

It appealed to the Circuit Court, an appellate court from the justice court. In the Circuit Court the case was tried by a jury and a verdict rendered for the respondent. It was then appealed by them to the Supreme Court of Arkansas and it was by this, the highest court of the State, affirmed in respondent's favor.

An inspection of the pleadings in this case will show that no question was raised to the jurisdiction of either of the courts in which it has been adjudicated, nor was there any Federal question raised by the pleadings that it was in any way in violation of the Constitution of the United States. The case at bar is not analogous to a case that might arise after October 28th, 1918, when the Director General issued his order No. 50. The case at bar was a cause of action that arose on the 23rd of July 1918, and suit was brought in August 1918, before this order was made. It was properly brought against

the Missouri Pacific Railroad Company at that time, because the order to require suits to be thereafter brought against William G. McAdoo was not issued for nearly three months after the suit at bar was brought.

At the time the suit was brought the respondent was a servant of the Missouri Pacific Railroad Company, and the doctrine of RESPONDEAT SUPERIOR applied.

The judgment in the suit at bar was not in conflict with amendment No. 14, Sec. 1, of the Constitution of the United States.

The United States Railroad Administration, Director General of Railroads Bulletin No. 4 (Revised) p. 20, issued on October 28th, 1918, General Order No. 50, we have this proviso: "Provided, however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures."

The question now raised by petitioner as to Amendment No. 14, Sec. 1 of the Constitution of the United States was not raised even in their brief in the Supreme Court of Arkansas let alone in their pleadings, but the Supreme Court of Arkansas very ably we think, answered the contention that the petitioners now raise on that question and

we here quote the decision of the Supreme Court of Arkansas on this point:

“Lastly, appellant insists that it was erroneous to render any judgment against the Missouri Pacific Railroad Company, for the reason that the undisputed evidence showed, that at the time of the employment and discharge of appellee, the railroad was being operated by Walker D. Hines, Director General of Railroads in the United States of America, and not by said railroad company. Under authority granted by Congress on August 1916, the President issued a proclamation on December 26th 1917, for the Director General to take possession of certain railroads in the United States, including the Missouri Pacific Railroad Company. On March 21st 1918, thereafter, Congress passed a Statute to the effect that, Carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except so far as may be inconsistent with the provisions of this Act, or any other Act applicable to such Federal control or with any order of

the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.

If the word "carriers" used in this act had reference to the Director General, who was operating said railroad, then it was improper to render judgment against the Missouri Pacific Railroad Company. We are unable to find anything in the language or context used, that indicates that the word "carriers" refers to the Director General. On the contrary, the plain meaning is, that, so far as suing and being sued is concerned, the railroad company occupied exactly the same status, after being taken over by the Government, as before. The case of *Rutherford vs. Union Pacific Rd. Co.* 254 Fed. 880, cited by appellant in support of its position that the statute in question had reference to the Director General, and not to the original

corporation, argued that the Director General occupied the same position with reference to the railroad as receivers do. We do not think the position occupied by the Director General is analogous to that of a receiver. The attitude of a receiver is that of a trustee for the benefit of the creditors. The attitude of the Director General is that of an agent of the Government taking over the railroads as a necessity of war, under Congressional and Presidential authority. A receivership implies insolvency; the operation of the railroad under the director general does not carry such implication. We think the later case of *Jensen v. Lehigh Valley Rd.* 255 Fed. 795 is the better reasoned case. It was said by Judge Hand in the latter case: "It appears to me that Congress pretty clearly meant, by the term "carriers" the corporations themselves, and that the right to sue them must remain certainly till it is changed by some valid provision."

It may be contended that the statute in question is unconstitutional, because, if the claim is reduced to a judgment, and enforced against the property of the cor-

poration, it would amount to a taking of private property without due process of law from the corporation to pay a liability incurred by the act of the Federal authorities operating the road. We do not understand that such would be the effect of the act. Immunity from loss, as well as assurance of a reasonable return upon the investment, was guaranteed the railroad corporations by the government. Act March 21st, 1918, c, 25, 40 Stat. 451. Under such a guarantee the enforcement of judgments against the property of the railroad corporations during the control by Federal authorities could not have the effect of confiscating their property. Immunity from loss and assurance of gain are a complete answer to any contention that the enforcement of such judgments, would be the taking of private property for public purposes without just compensation. We think the act constitutional.

No error appearing in the record, the judgment is affirmed."

The respondent worked for the Missouri Pacific Railroad Company twenty-one days and earned

at the contract price fifty dollars for his labor. He has been forced to defend his rights from the lowest court in the state of Arkansas to the Highest Court in the World, and has never to this day received one single cent for his labor.

Therefore we respectfully submit that the petitioners are not entitled to have a writ of certiorari from this court to the Supreme Court of Arkansas to bring the record here; that their petition be denied and that the decision of the Supreme Court of Arkansas be in all things approved and affirmed.

Respectfully Submitted,

FRANK PACE, *Attorney for*
Petitioner, Little Rock, Ark.

D. D. GLOVER and

JABEZ M. SMITH,

of Counsel.

Malvern, Ark., March 12th, 1920.

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IN THE
Supreme Court of the United States

MISSOURI-PACIFIC RAILROAD COM-
PANY AND WALKER D. HINES,
DIRECTOR GENERAL OF RAIL-
ROADS.....*Plaintiffs in Error,*
v. No. 252. October term, 1920.
H. A. F. AULT.....*Defendant in Error.*

IN ERROR TO SUPREME COURT OF
ARKANSAS.

PLAINTIFF IN ERROR'S BRIEF ON THE
WRIT OF ERROR.

This cause is here on writ of error, and also on petition for certiorari, which are to be heard together. A short brief accompanies the petition for certiorari. It is thought a further brief

on the writ of error, with more complete citation of authorities will be of assistance to the court.

STATEMENT OF CASE.

Defendant in error sued the Missouri-Pacific Railroad Company in the justice of the peace court, for wages earned as an employee while the railroad was being operated by the Government, and for penalty for their non-payment when he was discharged. There was judgment by default and the Missouri-Pacific Railroad Company appealed to the circuit court, and there moved that the Director General of Railroads be submitted for it as party defendant. This motion was overruled, but the Director General was by the court made a joint defendant (Rec., p. 5). There was a jury trial. Following was the verdict:

"We, the jury, find for the plaintiff in the sum of \$50 as debt for labor; also \$2.50 per day as penalty from the 28th day of July, 1918, until the present date."

On which the court entered judgment that Ault recover from both the defendants, the

Missouri-Pacific Railroad Company and Walker D. Hines, "the sum of \$50 as his debt for labor performed, together with the sum of \$390 as penalty" (Rec., p. 6).

The penalty was claimed and awarded under a statute of Arkansas, as follows:

"Whenever any railroad company or corporation or any receiver operating any railroad engaged in the business of operating or constructing any railroad or railroad bridge shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; and such servant or employee may request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept; and if the money aforesaid, or a valid check therefor, does not reach such station within seven days from the date it is so requested, then as a penalty for the nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid. *Provided*, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time (m). Act April 21, 1903." (Section 6649, Kirby's Digest, 1904.)

The Missouri-Pacific Railroad Company, and the Director General of Railroads appealed to the Supreme Court of Arkansas, where the judgment was affirmed (Rec., p. 50). Writ of error was allowed by the Chief Justice of the Supreme Court of Arkansas (Rec., p. 58), on the assignment that the court erred in sustaining the lower court in refusing to substitute the Director General for the Railroad Company as sole defendant, and in holding that judgment could lawfully be rendered against the Missouri-Pacific Railroad Company on a cause of action growing out of the possession, use and operation of the railroad by the Government, and in holding that the enforcement of such a judgment against the railroad would not be a taking of private property without due process of law, contrary to the Fourteenth Amendment to the Constitution, and in holding that the above named statute was valid and binding as against the Director General of Railroads (Rec., pp. 56, 57).

The questions involved, therefore, are:

1. Is a carrier corporation liable to a judgment for the cause of action arising out of the

possession, use, control and operation of its railroad by the Director General of Railroads of the United States during the recent operation of railroads by the Government?

2. Is the Director General of Railroads liable to a penalty denounced by a State statute for failure to pay wages due to an employee within seven days after his discharge?

These questions are raised first by a motion of the Missouri-Pacific Railroad Company in the trial court to dismiss the cause as to Missouri-Pacific Railroad Company and substitute the Director General of Railroads as sole defendant, which motion was overruled. At page 5 of the printed record is the order of the trial court denying this motion, and exceptions by plaintiff in error. At page 7 of the printed record is the motion for a new trial giving this as a ground for new trial in the trial court which operates as an assignment of errors in the Supreme Court of Arkansas, under the Arkansas practice.

At page 53 of the printed record is the portion of the opinion of the Supreme Court of

Arkansas passing on the question, and holding that it was not erroneous to render judgment against the Missouri-Pacific Railroad Company.

At page 45 of the printed record is the defendant's request for instruction that the plaintiff was not entitled to recover any penalty, and exception saved; at page 7 of the printed record is the refusal of the trial court to give this instruction, made the ground for a new trial, and at pages 50 and 54 of the printed record is the decision of the Supreme Court of Arkansas affirming the judgment; at page 55 is defendant in error's petition for rehearing in the Supreme Court of Arkansas, further directing the court's special attention to judgment sustaining the penalty and objecting to the same, and also the court's decision overruling the petition for a rehearing is at page 56 of the printed record; this was on December 8, 1919.

At pages 56 and 57 is the plaintiff in error's assignment of errors, assigning the decision of the Supreme Court on both of these questions as error.

Writ of error allowed and issued January 31, 1920 (Rec., pp. 58, 60).

Writ of error filed in Arkansas Supreme Court February 2, 1920 (Rec., p. 61).

Citation returned served, and filed February 3, 1920 (Rec., p. 62).

Return to writ, with transcript of record filed in this court on February 20, 1920 (Rec., p. 62).

SPECIFICATION OF ERRORS.

Plaintiffs in error specifies the following errors:

1. The Supreme Court of Arkansas erred in sustaining the judgment of the trial court against the Missouri-Pacific Railroad Company, and in holding that judgment could be lawfully rendered against that company on a cause of action in a transaction of the defendant in error with the Director General of Railroads, growing out of the possession, control and operation of said railroad by the Director General of Railroads of the United States.

2. Said court erred in holding that the operation and enforcement of the judgment against the Missouri-Pacific Railroad Company

on a cause of action arising out of the possession, use, control and operation of said railroad by the Director General of Railroads for the United States, would not amount to a taking of property without due process of law, contrary to the provisions of section 1 of article 14 of the articles in amendment of the Constitution of the United States.

3. The court erred in holding that under general order No. 50 of the Director General of Railroads, it was not necessary for the Director General of Railroads to be substituted as a party defendant in place of the Missouri-Pacific Railroad Company, and the Missouri-Pacific Railroad Company to be dismissed from the action.

4. Said court erred in holding that section 6649 of Kirby's Digest of the Statutes of Arkansas was valid and binding as against the Director General of Railroads for the United States, which section authorized a judgment for a penalty against the Director General of Railroads of the United States.

ARGUMENT.

I.

JUDGMENT FOR ANY SUM CAN NOT LAWFULLY BE RENDERED AGAINST THE MISSOURI-PACIFIC RAILROAD COMPANY ON CAUSE OF ACTION ARISING OUT OF THE RECENT POSSESSION, CONTROL AND OPERATION OF ITS RAILROAD BY THE UNITED STATES GOVERNMENT.

The Arkansas Supreme Court held such a judgment lawful on the grounds that it was authorized by section 10 of the Act of Congress of March 21, 1918, which provides that:

"Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

It construes the word "carriers" as used in that section to mean the carrier corporation, instead of the agency of the Government operating the railroad. Thus construing the word "carriers" it finds authority in the last sentence in that section for the bringing of actions at law and rendering judgments against "such carriers."

In addition to being in conflict with what the average man's idea of justice would naturally require, and therefore in conflict with what the average man would naturally expect the law to be, such a construction encounters a number of objections on the face of the statute itself, and also is in conflict with the weight of authority.

The Supreme Court of the United States in *Northern Pacific Railway Company v. State of North Dakota*, 250 U. S. 135, emphatically declares that the Acts of Congress and the various presidential proclamations, had entirely separated the corporations from their property, and, to quote the language of the Chief Justice, had created "complete possession by governmental authority to replace the private owner-

ship theretofore existing." The Chief Justice, in the opinion in that case, seemed specially to emphasize that phase. We quote from his opinion, found at page 903 of 63rd Law Ed. as follows:

"No elaboration could make clearer than does the Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing?"

It necessarily follows that the corporation, during the period of Government operation,

was no longer a carrier, its every function as such was superseded, and as a carrier, the Federal Government, acting through its designated agency, replaced it.

It further follows that the corporation, during such period, was not under Federal control within the meaning of section 10, which, of course, must intend by the words "under control" not the ordinary supervision which the Government commonly exercises over all carrier corporations as instrumentalities of interstate commerce, but the custody, use and operation of the property provided for in the war emergency legislation.

The language then, with which section 10 begins, "Carriers while under Federal control" must mean the carrying instrumentality and the agency operating it, and not the corporation owning it. The meaning of Congress, therefore, in the provisions of section 10 must be that the agency which replaced the corporations as carriers "shall be subject to all laws and liabilities as common carriers" and that actions at law may be brought by and against the agency which replaced the corporations, but not against the corporations themselves.

This meaning is further indicated in the provision in the last clause that "In any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government." It is entirely unreasonable to construe the word "carrier" as there used as meaning the corporations, as they were, during the Government control, in no sense agencies or instrumentalities of the Federal Government. They had been separated from their property and had been superseded in the control and operation by the designated agency of the Government, to wit, the Director General. If a carrier corporation were sued, it would have no occasion whatever to assert the defense that it was an instrumentality or agent of the Government.

This effect of this provision upon the question of construction of section 10 is aptly stated in the case of *Rutherford v. Union Pacific*, 254 Fed. 880, as follows:

"Moreover the language which immediately follows that portion of the statute relied on by plaintiff demonstrates that the 'carrier' who is subject to suit is the agent of the President operating the roads.

“ ‘And in any action at law or suit in equity against the carrier, no defense shall be made upon the ground that the carrier is an agency or instrumentality of the Federal Government.’

“The corporations or persons who had lost control and possession of the railroads would have no occasion to assert the defense that they were instrumentalities or agents of the Government as to acts which occurred after their control had terminated.”

It is thus seen that the construction given to section 10 by the decision of the Supreme Court of Arkansas in this case, that the words “carrier while under Federal control,” “such carriers” and “against the carrier” mean the corporations, does not fit the conditions.

In the first place, the corporation deprived of the medium of transportation is no longer a carrier at all.

In the second place, the corporation, as such, was no longer “under Federal control.”

“The petitioner’s corporate entity and its franchises were not taken over by the Government, but only its existing physical lines of telegraph.” *Postal, etc., Cable Co. v. Call*, 255 Fed. 850.

The activities of the railroad corporations, during Government control, were confined to the receipt of their agreed compensation from the Government, and the management of that portion of their property not connected with transportation and hence not under Federal control. They owed no duties to the Government not owed in common with other citizens and corporations. The terms "carriers under Federal control" and "such carriers" and "against such carriers" can, therefore, not apply to them.

On the other hand, those terms are directly and clearly applicable to the agency designated by the Government to operate such instrumentalities.

But if there could reasonably have been a difference of view as to the intent of Congress in the language of section 10 on this point it should no longer exist, after the enactment of the Transportation Act of 1920. It was a question of the intent of Congress in section 10 as to whether the liabilities as common carriers attached to the corporations or to the agencies operating the railroads for the Government.

towit: the Director General, and whether or not the actions at law and in equity provided in section 10 to be brought against such carriers would be against the corporations owning the railroads or against the Director General; Congress, with knowledge of some dispute as to the intent in section 10, inserted in the Transportation Act a direct and carefully prepared provision for suing the agency designated by the Government, towit: the Director General as agent, he being the agent to be appointed by the President to succeed the Director General, and further to emphasize the legislative intent that the liabilities should attach to and the suits be brought against the Governmental agency alone and not against the corporations, it inserted in the Transportation Act of 1920, the following provision: 206 (g) "No execution or process other than on a judgment recovered by the United States Government against the carrier shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control or operation of any railroad or system of transportation by the President under Federal control."

Section 206 of the Transportation Act provides in detail for suits against the designated Federal agency on cause of action arising during the Federal operation and prohibits any execution against the property of the corporation. This is a construction by the legislative body itself, as to the meaning of its former enactments. Prior to that enactment and in the early stages of Federal control there were a few cases decided construing section 10 of the Act of March 21, 1918, as permitting judgments against corporations; but even at that early period, the weight of authorities was to the contrary. And, since the enactment of the Transportation Act of 1920, authorities are practically uniform in holding that such judgments are not permitted.

The United States Circuit Court of Appeals for the Eighth Circuit has recently passed on the question in two (2) cases:

Hines v. Dahn, decided August 2, 1920, 267 Fed. 105, was considered and decided by Circuit Judges Sanborn and Carland and District Judge Trieber, and was a well-considered opinion by Circuit Judge Carland, citing all the au-

thorities. The opinion says: "We do not think there could be any doubt about the meaning of the words "railroad" and "system of transportation" as used in the several acts of Congress and the proclamations of the President. In our judgment they refer only to the physical properties which constitute the system, or systems * * * the President had no authority nor did he pretend by the language of his proclamation, to take over the railroad corporation, or corporations, which owned the several systems, * * * Whoever has the management, control and operation of a transportation system, which is engaged as a common carrier in the transportation of passengers and freight from one place to another, is the carrier, so far as liability is concerned, for negligent operation."

The court further says:

"If it was the corporation entity, in this case the Illinois Central Ry. Co., which was to be liable for the negligence of the Director General, why did Congress provide in the Federal Control Act and the President in his proclamation, that no executions should issue on a judgment? This is a provision not found in legislation in regard to litigation, between private parties, but in litigation between private parties

and the sovereignty extending also to cities and other corporations exercising governmental functions."

In *Mardis v. Hines*, 267 Fed. 171, the same court, a few weeks after the *Dahn* case, reiterated the same conclusion, Circuit Judge Hook delivering the opinion. In that case an action was brought in the State Circuit Court of Arkansas against both the Missouri-Pacific R. R. Co. and the Director General, on a cause of action arising during the Federal control. On the ground of diversity of citizenship, the case was removed to District Court of the United States for the Western District of Arkansas, where the Missouri-Pacific demurred to the complaint, which demurrer the court sustained. From the judgment sustaining the demurrer plaintiff appealed to the United States Circuit Court of Appeals, which affirmed the judgment sustaining the demurrer, on the ground that the carrier corporation was not liable on a cause of action arising out of Government operation. This case in the district court is reported in 258 Fed. 945, and is cited in our brief which accompanies our petition for writ of certiorari, which was filed in this court prior to the decision in appeal to the court of appeals.

Other recent authorities are in line with the holding in these two cases. We refer to some of them as follows:

The Director General is a carrier since the Government took the operation of the roads, and general order 50 is authorized and valid, notwithstanding the provisions of the Act of March 21, 1917; the word "carrier" in section 10 of that act means the transportation system and not the corporation entity.

Rutherford v. Union Pacific R. Co.
(Dist. Court Nebraska) 254 Fed.
880.

Suit on a claim during Government operation is against the Government, but is authorized by the consent given in the act. The claimant can not sue a carrier corporation but his remedy is limited to a suit against the Director General.

Haubert v. B. & O. R. Co. (Dist Court
Ohio) 259 Fed. 361.

General order 50 is within the authority conferred by the act and is not inconsistent with the provisions of the act. Under that order the

Director General will be substituted and the carrier corporation dismissed from the action.

Nash v. Sou. Pac. Co. (Dist. Court California) 260 Fed. 280.

A railroad corporation can not be made liable for damage to a shipment occurring during Government operation, notwithstanding the provisions of section 10, March 21, 1918.

Hatcher & Snyder v. Atchison, T. & S. F. Ry. Co. (Dist. Court of Colorado) 258 Fed. 952.

Under the Acts of Congress, proclamations and general orders, including No. 50, a suit for personal injuries during the Government operation is authorized against the Director General notwithstanding it is in effect a suit against the Government.

Dahn v. McAdoo, Director General *et al.* (Dist. Court Iowa) 256 Fed. 549.

Upon the taking possession and control of the railroads by the Government all of the employees of the railroads who continued to work after the transfer to the Government, became employees of the Government, and service

could not be had on any of them in suits against corporations on causes of action arising prior to government control.

Southern Cotton Oil Co. v. Atlantic Coast Line R. R. Co., 257 Fed. 138.

Wade v. Seaboard Air Line Ry. Co. (Dist. Court Georgia) 257 Fed. 138.

Wood v. Clyde S. S. Co. (Dist. Court Florida) 257 Fed. 879.

The court will take judicial notice that the Government was operating the Missouri-Pacific Railroad Company in January, 1918. Judgment against a railroad company on a claim for injuries to live stock during Government operation is erroneous.

Cravens v. Hines, Dir. Genl. (Springfield Court of Appeals of Missouri) 218 S. W. 912.

To the same effect are:

Dooley v. Penn. R. R. Co., 250 Fed. 142.
U. S. v. Kambeitz, 256 Fed. 247.

Wainwright v. Penn. R. R. Co., 253 Fed. 459.

West v. Railroad, 123 N. E. Rep. 621.

II.

BEFORE THIS ACTION WAS COMMENCED THE SEPARATION OF THE CARRIER CORPORATIONS FROM THE CONTROL AND OPERATION OF THEIR RAILROAD SYSTEMS WAS COMPLETE AND THEREAFTER ONLY THE DIRECTOR GENERAL WAS SUBJECT TO SUIT AND JUDGMENT.

In our foregoing argument we have assumed that the same reasons existed at all times after the President issued his first proclamation for the taking over of the railroads for the filing of suits and obtaining of judgments against the Director General. We have argued that at all times judgments could lawfully be rendered on causes of action arising out of the operation by the Government against the agency designated by and acting for the government in the custody and operation of the railroads, and have assumed that at all times the Director General of Railroads constituted that agency.

It is possible, however, that a contention might be made that during the early part of the period of Federal control the carrier corpora-

tions themselves were availed of by the Government as in part the designated agency of the Government in the operation of the roads; that they were used by the Government as such agency of the Government to the extent, at least, of being the agency of the Government to represent the Government as defendant in actions to enforce liability arising out of Government operation.

For the reason already argued we do not think such contention sound. But, if it should be considered that the corporations did continue for a time after the Government first took charge of the railroads to act in a limited capacity as agents for the Government for the operation of the railroads, or for the purpose of being defendants in such suits, nevertheless they had wholly ceased to act as such before the institution of this action and before its trial, and the separation of the corporations from all control over the railroads was complete, and any limited agency for the Government, which it might be contended they had, had entirely ceased.

For the purpose of making this clear, we call the court's attention shortly to the history of the railroad administration, as shown in the official acts and proclamations and the general orders and circulars issued by the Director General; all of which are found in the "United States Railway Administration, Director General of Railroads Bulletin No. 4, Revised," regularly issued by the railroad administration and printed in the Government printing office. Of these documents and steps taken in the administration of the railroads, the court will take judicial notice.

On December 26, 1917, the President issued his proclamation whereby he "takes possession and assumes control" of all the railroad property, appoints Mr. McAdoo, Director General, and provides that "until and except so far as said Director General shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of business as common carriers, in the names of their respective companies."

On March 21, 1918, Congress passed the Federal Possession and Control Act, containing section 10, already cited in this brief, which provided that "carriers, while under Federal control, shall be subject to all laws and liabilities," etc. At the time this act was passed transportation of the country was being carried on under the Director General by the corporate officers "in the names of their respective companies," but that situation later ceased to exist.

Following the passage of that act, the President, on March 29, 1918, by proclamation, authorized Mr. McAdoo, as Director General, personally or through his divers agencies or persons whom he may appoint, to "issue any and all orders which may in any way be found necessary or expedient in connection with the Federal control," and generally to do all acts and things and exercise all powers and duties which by said act or any other act in relation to the subject hereof the President is authorized to do and perform.

On May 21, 1918, the Director General issued the following public announcement (see page 113 of Bulletin 4 aforesaid):

"In view of the direct responsibility for the operation of the railroads of the country placed upon Director General McAdoo by the Act of Congress and by the proclamations of the President, he has been unable to escape the conclusion that it will be advisable to place *in direct charge of each property for operating purposes a representative to be known as the Federal manager, who will report to the Regional Director* * * * While in this way the responsibility for the operation of the property will be directly to the Regional Directors and *not to the boards of directors*, it is the purpose of the Director General to accord to the boards of directors and their representatives the fullest opportunity to keep advised as to the operation and improvement of the properties and to maintain with the Director General and the Regional Directors the fullest interchange of views as to what is in the best interest of the Government and of the stockholders.

"In the development of this policy the Regional Directors and also the Federal managers will be *required to sever their official relations with the particular companies* and to

become *exclusive representatives of the United States Railroad Administration.*

"The first moves in the inauguration of this policy will be through the creation of two new regions to be known as the Allegheny Region and the Pocahontas Region."

This order placed each property in direct charge of a representative known as the Federal Manager, who would report to the Regional Director, and this manager and Regional Director were "required to sever their official relations with the corporations" and to "become exclusive representatives of the U. S. Railroad Administration." And as the first moves in this policy he created the Allegheny and Pocahontas Regions.

Afterward, on various dates, he created other regions, gradually inaugurating this policy over the entire country.

On June 6, 1918, the Director General issued circular No. 35, creating the Southwestern Region, and appointed Mr. B. F. Bush Regional Director, with offices in St. Louis, Mo. and designating the several railroad lines which should

comprise the Southwestern Region, including among many others, all the lines of the Missouri-Pacific Railroad Company and the Missouri-Pacific Railway System. (Bulletin 4 aforesaid, page 375.)

Immediately thereafter the Regional Director issued an order duly approved by the Director General appointing Mr. Alex. Robertson as Federal Manager for certain roads including all the lines of the Missouri-Pacific Railroad Company.

On July 19, 1918, the Director General issued general order No. 37, dealing with Federal treasurers. This order will give a clear idea of the completeness of corporate separation intended and effected by the Director General. It provided that "a treasurer appointed by the Federal Manager shall be known as the Federal Treasurer and are expected to devote themselves exclusively to the work of the U. S. Railroad Administration. They ought not to handle any funds for a railroad corporation or perform any other services therefor, except in special cases after obtaining express authority." The order further provides for the immediate

transfer to a Federal account of (a) all cash receipts from the operation since January 1, 1918, (b) all cash in corporation hands for use and operation of the road. And further provided, together with general order No. 37-a, an elaborate and complete system for the handling of the moneys accruing from the operation of the railroads by the U. S. Railroad Administration.

On October 28, 1918, the Director General's order No. 50, issued as follows:

General Order No. 50.

Washington, October 28, 1918.

Whereas, by the proclamations dated December 26, 1917, and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said proclamations that "until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all ex-

isting statutes * * * but any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such;" and

Whereas, the Act of Congress, called the Federal Control Act, approved March 21, 1918, provided that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control, or with any order of the President;" and

Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on cause of action arising during or out of Federal control should be brought directly against the

said Director General of Railroads and not against said corporations;

It Is Therefore Ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court, based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; *provided, however*, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures.

Subject to the provisions of general orders numbered 18, 18-A and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the rail-

road or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1918, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

The undersigned Director General of Railroads is acting herein by authority of the President and for and on behalf of the United States of America, therefore no supersedeas bond or other security shall be required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process, or otherwise in

respect of any such cause of action or proceeding.

W. G. McAdoo,

Director General of Railroads.

In view of this court's decision in the case of Northern Pacific R. R. Co. v. State of North Dakota, *supra*, that the acts of Congress and proclamations of the President had transferred complete possession and control of the properties from the corporations to the United States, no elaboration of the steps taken would be necessary. But perhaps it might be disputed as to what date prior to that decision of the court this transfer became complete; and we have taken the steps with their dates to show that prior to the institution of this action (which was on August 10, 1918—see page 2 of the printed record) and its trial on January 29, 1919, every vestige of control and possession of the railroad properties had passed out of the hands of the corporations and into those of the Government, and the Director General and his subordinates constituted the designated agency of the Government for all purposes relating to said properties and their handling.

If suit was ever authorized against a carrier corporation, that authority did not continue after the issuing of general order No. 50. And if a suit was pending against a carrier corporation at the time that order was issued, then on motion it was proper that the Director General be substituted as party defendant and the carrier corporation dismissed from the action. That is the requirement of the order. The order uses the word "may" but the whole framework of the order shows that this word is used, as it frequently is used in similar connections, in the sense of "must." The preamble to the order and the purpose to be accomplished, as gathered from the terms of the whole order, taken together, shows that it was intended that the Director General only should be subject to suit and to judgment, for causes of action arising out of the operation of the railroads by the Government. The trial court was asked by motion regularly filed to substitute the Director General instead of the Missouri-Pacific Railroad Company as party defendant, and to dismiss the action as to said Railroad Company, and it denied the motion (see page 5 of printed record) and the Supreme Court of Arkansas sustained this ruling, which, we submit, was error.

III.

THE OPERATION AND ENFORCEMENT OF A JUDGMENT AGAINST THE MISSOURI-PACIFIC RAILROAD COMPANY FOR A CAUSE OF ACTION ARISING OUT OF FEDERAL OPERATION OF ITS RAILROAD, WOULD AMOUNT TO TAKING ITS PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

We submit that to construe section 10 of the Federal Control Act of March 21, 1918, as authorizing the rendering and enforcing judgments against corporation owners of railroad property on causes of action arising out of the possession and control of such property by the Government would render the provision contrary to the Constitution of the United States, because it would take the corporations' property without due process of law, in that it would take the property of a private person to satisfy the claim of another private person against one for whose acts the first named private person is in no way responsible.

If section 10 be so construed it means that it establishes an arbitrary rule under which one person is made answerable for the defaults and negligence of another who is using a portion of his property without his consent. Such a rule is not consistent with the due process of law clause of the Federal Constitution.

In *Camp v. Rogers*, 44 Conn. 291, a statute attempted to make the owner secondarily liable for the negligence of any person driving his vehicle on a public street; it was sought to apply this statute in a case where the driver was not an agent or servant of the owner but a mere trespasser. The court said:

"If this be a correct construction it is so far void either as manifestly against natural justice, or as violating that article of the Constitution which prohibits the taking away of any person's property without due process of law. If such a law so construed were to be held valid then a law that should by a merely arbitrary rule make one man liable for the debts of another would be valid."

The same result is reached in *Dougherty v. Thomas* (Mich.), 140 N. W. 615, involving

one of the recent attempts to impose by statute an absolute liability upon the owner of an automobile for the acts of any other person driving it, whether his servant or not. The court said: "To hold the provision constitutional is to hold a party absolutely liable for the negligent conduct of another, a mere stranger or a wilful trespasser. * * * Such a doctrine seems unnatural and repugnant to the provisions of the Constitution."

In *Shumacher v. Pa. Ry. Co.*, 175 N. Y. S. 84, the court construed section 10 of the Federal Control Act as authorizing judgments against the carrier corporations on causes arising in Federal operation, and held that so construed the provision would be unconstitutional because contrary to the Fourteenth Amendment.

The court cited the case of *U. S. Administration v. Burch*, 254 Fed. 140, which held that the Act of Congress did not authorize the Director General to take possession of lands belonging to the railroad company, which are not used in the business as a carrier, and that a sale of such lands under an execution would not be enjoined by the court.

In referring to the possible contention that compensation by the Government to the carrier corporations had been provided and would remove the conflict with the Constitution, the court in the Shumacher case said:

"If the carrier were compelled to pay the judgment thus sought to be entered it would undoubtedly have a just demand against the Government to be reimbursed for the money so paid; but the fact that such a demand exists in no way cures the statute of the infirmity of unconstitutionality. The taking of the property of one to pay the debts of another is none the less illegal even though the party wronged may assert his right to compensation. The condemnation is against the illegal taking and the violation of this constitutional guaranty is not cured by the possibility of future restitution."

If it be contended that the sovereign has the inherent power to take private property for public use, and that section 10 as so construed, is but an exercise of this right, the obvious answer is that the act goes further in that it provides not for the taking of a corporation's property by the government itself, but by a

third party to pay a government liability, the enforcement of a liability against a party in no way legally responsible for it. To carry the argument to its logical extent it might, with equal propriety be urged that Congress had the right to enforce actions against private individuals for the payment of Government bonds.

The United States Circuit Court of Appeals for this circuit, in *Hines v. Dahn*, *supra*, held that such construction would bring the provision in conflict with the Federal Constitution, saying in its opinion:

"It would be unconstitutional and contrary to the law of the land to hold that the railroad corporation, in this case, the Illinois Central Railway Co., as a corporate entity should be liable for an act done or omitted to be done in the operation of the transportation system by another party over which it had no authority or control."

IV.

THE PENALTY DENOUNCED BY THE ARKANSAS STATUTE FOR FAILURE TO PAY WAGES WHEN DUE IS NOT RECOVERABLE AGAINST THE DIRECTOR GENERAL OF RAILROADS.

Following is the verdict of the jury and the judgment of the court in this action:

"We the jury, find for the plaintiff in the sum of \$50 as debt for labor; also \$2.50 per day as penalty from the 28th day of July, 1918, until the present date."

"It is therefore considered, ordered and adjudged by the court that the plaintiff, H. A. F. Ault, do have and recover of and from the defendants, Missouri-Pacific Railroad Company and Walker D. Hines, Director General of Railroads, or either of them, the sum of fifty (\$50) dollars, as his debt for labor performed, together with the sum of three hundred ninety (\$390) dollars as penalty, and all costs accrued herein for which execution may issue." (Rec., p. 6).

The statute describes this exaction as a penalty. The language is "then as a penalty for such nonpayment, the wages of such servant or employee shall continue at the same rate until paid." It is not only a penalty, but a very severe one; if only one day's wages are due the employee and are not paid, his wages continue at the same rate, and may continue during the whole course of litigation to determine any dispute between the employer and the servant as to the amount of the wages. If a timekeeper's mistake or alleged mistake has resulted in a dispute in good faith between the carrier and the servant as to the amount due, if an employer stands on his right to test the validity of the claim by submitting to litigation, he must succeed in the litigation on the pain otherwise of paying the man wages during the whole course of the litigation, which may continue for a year or more.

The Supreme Court of Arkansas has said that for purposes of determining what court has jurisdiction this exaction may not be called a penalty, but compensation for delay in payment and punishment for failure to pay. In

other words, it is exemplary or punitive damages for failure to pay a debt.

Leep v. Railway, 58 Ark. 407.

We contend that the Government has not consented to be sued or to suffer judgment for punitive damages or penalties of this character.

The sovereign can not be sued or have judgment rendered against it without its consent. Its consent will not be presumed, but must be affirmatively shown. The defendant in error must, therefore, point out the provisions of the law which permit suit against the United States or its Director General of Railroads for this kind of an exaction.

If we look to the laws which are said to authorize the suits against the Director General, we find that Congress has enacted in the law of March 21, 1918, that "carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or common law, except in so far as may be inconsistent with the provisions of this act or any other act ap-

plicable to such Federal control, or with any order of the President."

Section 8 of the act provides that the "President may execute any powers herein and heretofore granted him with relation to the Federal control, through such agencies as he may determine." Section 9 provides that "the President, in addition to the powers conferred by this act, shall be and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

The President, by his proclamation of March 29, 1918, reappointed William G. McAdoo as Director General, and designated him as the agent of the President for the carrying out of the provisions of the above named act, and specially vested him with authority "to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads and inland waterways, as fully in all respects as the President is authorized to do, and generally to do and perform all

and singular all acts and things, and to exercise all and singular powers and duties which in and by said act or any other act in relation to the subject hereof, the President is authorized to do and perform."

The Director General of Railroads thus became the agency of the Government for the carrying out of the provisions of the act. He issued general order No. 50 on October 28, 1918, which has already been copied in this brief. That order specially excepted from the right to bring suits or render judgments against the Director General of Railroads "suits or proceedings for the recovery of fines, penalties and forfeitures."

By virtue of the exception in section 10 of the Act of March 21, 1918, to the effect that the carriers under Federal control should not be subject to laws and liabilities as common carriers which were inconsistent "with any order of the President," and in this general order No. 50, which is in effect an order of the President, suits and judgments against the Director General for fines, penalties and forfeitures were prohibited and excepted from the right to sue.

That this order and other orders issued by the Director General of Railroads is within the power conferred by law, there are numerous authorities:

Nash v. Southern Pacific Ry. Co., 260
Fed. 280.

Mardis v. Hines, 258 Fed. 945.

Blevins v. Hines, 264 Fed. 1005.

Wainwright v. Penn. R. R. Co., 253
Fed 459.

Harnick v. Penn. R. R. Co., 254 Fed.
748.

On the precise point as to whether the Director General is liable to suits and judgments for fines, penalties and forfeitures, the authorities are meager. In *Hines v. Taylor*, 84 Sou. 381, the Supreme Court of Florida held that a statute of that State which provides double damages for killing stock by a railroad because of failure to fence the tracks, is not applicable to suits against the Director General for cause of action arising during Federal control. The court says: "This action being in effect against the United States by its permission, pursuant

to the Act of Congress of March 21, 1918, and the general orders issued thereunder, the penalty portion of the statute is not applicable."

In *Ginn v. U. S. Railroad Administration*, 103 S. E. 548, the Supreme Court of South Carolina held that the Director General can not be held liable for punitive damages.

In *Owens v. Hines*, 100 S. E. 617, the Supreme Court of North Carolina held "that judgment could not be rendered against the Director General for a penalty for delay in the transportation of freight," but held that judgment for such penalty could be rendered against the carrier corporation, notwithstanding the delay was during Federal control, on the ground that such statute was a police regulation which was not impaired by the Act of March 21, 1918. On March 1, 1920, this court granted a certiorari in that case. We are not advised that the case has yet been determined by this court.

Chilton v. Hines, 224 S. W. (Springfield, Mo. Court of Appeals) and *Mobile & Ohio R. R. Co. v. Jobe*, 84 So. (Miss.), are authorities to the effect that similar exactions may be recovered against the Director General.

This sort of an exaction is not within the "lawful police regulations" which are saved from impairment by section 15 of the Act of March 21, 1918. This penalty does not affect the health, comfort or safety of the public. It is a penalty to enforce an individual right, namely, the collection of wages, and is called by the statute which provides it a penalty; and it is apparent that it is a severe and onerous penalty.

All of the statute must be construed together; the provision of section 10 giving the President authority to make exceptions to the suits and judgments for which the Government shall be liable is as binding as the provision of section 15 saving lawful police regulations from impairment. As stated by Mr. Chief Justice White, in *Van Dyke v. Cordova Copper Co.*, 234 U. S. 188, "We may not, in order to give effect to those words, virtually destroy the meaning of the entire context; that is, give them a significance which would be clearly repugnant to the statute looked at as a whole, and destructive of its obvious intent."

The various provisions of the act should be read, so that all may, if possible, have their due and conjoint effect without repugnance or inconsistency.

New Lamp Chimney Co. v. Ansonia
Brass Co., 91 U. S. 656.

If we read the Act of March 21, 1918, as an entirety, we find that it is emergency legislation, temporary by its very terms, and that the President is given extensive powers and discretion to operate the railroads for the best interests of the Government. That is the outstanding feature of this act. When read together, it seems apparent that the provisions of section 10 that the President may make exceptions to the laws and liabilities which are to be enforced against the agency of the Government during Federal control, was intended as an important power, to be exercised at the discretion of the President, and the provision in section 15 that lawful police regulations are saved, is in a degree subordinated to the power given by the President. The discretion of the President should not be questioned by a narrow or nice construction of what is a lawful police regula-

tion. He has interpreted, and in his discretion has stated that a fine, penalty or forfeiture should not be recoverable against the Director General, and we submit that his authority for so declaring is clearly given by the Act of March 21, 1918, when read as a whole, with reference to the purposes to be accomplished by it.

Dated Little Rock, Arkansas, February 18, 1921.

EDGAR B. KINSWORTHY,

ROBERT E. WILEY,

Attorneys for Plaintiffs in Error.

Office Supreme Court, U. S.

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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1920.

No. 252.

MISSOURI-PACIFIC RAILROAD COMPANY AND
WALKER D. HINES, DIRECTOR GENERAL OF RAIL-
ROADS, PLAINTIFFS IN ERROR,

vs.

H. A. F. AULT, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

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A further reason why the penalty is not recoverable against the Director General is that the statute by its terms prescribes the penalty against "any railroad company or corporation, or any receiver operating any railroad" (see statute quoted at page 3 of brief for plaintiffs in error), and the Director General is not included among these. The statute is penal and must be strictly construed.

The statute as originally enacted included natural persons operating a railroad. It read as follows:

"Whenever any railroad company or any company, corporation, or person engaged in the business of operating or constructing any railroad," etc., proceeding as per quotation of statute at page 3 of our original brief as aforesaid. The only difference in the statute as there quoted and as here being the omission there of the word "person" as above used, which is made necessary by the decision of the court that as to natural persons the act is unconstitutional, and the addition of the words "any receiver." The Supreme Court of Arkansas held the statute, so far as it covered natural persons, in conflict with the State Constitution, as well as the United States Constitution, as denying the liberty of contract (*Leep vs. Ry.*, 58 Ark., 407). It sustained the act solely on the ground that as applicable to corporations it was within the reserved power in the Constitution to alter and repeal the charters of corporations (*id.*). This ground for its validity does not apply to the Director General of Railroads, and, there being no other basis for its validity, it must be held invalid because in conflict with the Constitution of the United States, section 1 of article XIV of the amendments thereto, which provides that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

EDGAR B. KINSWORTHY,
 ROBERT E. WILEY,
Attorneys for Plaintiffs in Error.

MARCH 21, 1921.